

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

JOCELYNNE FALLGATTER and JEFF	)	<b>CPSGMHB Case No. 06-3-0003</b>
KIRKMAN,	)	
	)	<b><i>(Fallgatter V-Comp Plan)</i></b>
Petitioners,	)	
	)	<b>ORDER OF CONTINUING</b>
v.	)	<b>NONCOMPLIANCE,</b>
	)	<b>AMENDING COMPLIANCE</b>
CITY OF SULTAN,	)	<b>SCHEDULE</b>
	)	
Respondent.	)	
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JOCELYNNE FALLGATTER and JEFF	)	<b>CPSGMHB Case No. 06-3-0034</b>
KIRKMAN,	)	
	)	<b><i>(Fallgatter VIII-TIP)</i></b>
Petitioners,	)	
	)	<b>ORDER OF CONTINUING</b>
v.	)	<b>NONCOMPLIANCE,</b>
	)	<b>AMENDING COMPLIANCE</b>
CITY OF SULTAN,	)	<b>SCHEDULE</b>
	)	
Respondent.	)	
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JOCELYNNE FALLGATTER,	)	
	)	
Petitioner,	)	<b>CPSGMHB Case No. 07-3-0017</b>
	)	
v.	)	<b><i>(Fallgatter IX-Capital Facilities Plan)</i></b>
	)	
CITY OF SULTAN,	)	<b>ORDER OF CONTINUING</b>
	)	<b>NONCOMPLIANCE,</b>
Respondent.	)	<b>AMENDING COMPLIANCE</b>
	)	<b>SCHEDULE</b>

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## **I. INTRODUCTION**

Sultan is a fast-growing city of almost 5000 people in the Cascade foothills at the confluence of the Skykomish and Sultan Rivers. *See Fallgatter VIII*, Final Decision and Order (June 29, 2006), at 5, 11. Though blessed with a spectacular natural setting, Sultan faces tough challenges. Because of the decline of the timber industry and loss of the motor vehicle excise tax, city revenues are insufficient to support city services. At the same time, a demographic transition from rural to urban is resulting in sharper citizen demands for reliable services, urban amenities, and more professional governance. *Id.*

Sultan's 2004 Comprehensive Plan projects growth to 11,000 people, and the City has sought an expansive UGA. *Fallgatter VII*, Order of Dismissal (June 29, 2006). The City owns and manages its own water and sewer utilities, which appear to have additional long-term capacity. *Fallgatter V*, Order Finding Partial Compliance (June 18, 2007), at 3-4. The City's location on State Highway 2 is a mixed blessing – the road makes Sultan readily accessible for further development, but major highway expansion or safety improvements, which are long overdue, are dependent on State priorities and funding. *See Fallgatter VIII*, Final Decision and Order (Feb. 13, 2007), at 6. The City's strategy appears to be to encourage development in order to build its tax base and generate revenue from development fees.

Petitioners Jocelynn Fallgatter and Jeff Kirkman were Planning Commissioners for the City of Sultan when the 2004 Comprehensive Plan was considered and adopted. In September 2004, they challenged various aspects of the Plan (*Fallgatter I v City of Sultan*, CPSGMHB Case No. 04-3-0021), and one or both have filed subsequent appeals of the City's planning actions.<sup>1</sup> In those cases where the Board found noncompliance, the Board, in light of the City's shortage of staff and expertise, granted the City additional time to achieve compliance. *See Fallgatter V*, FDO, at 22; *Fallgatter VIII*, FDO, at 5. Three of those cases are involved in this coordinated compliance proceeding.

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<sup>1</sup> See, *Fallgatter I v. City of Sultan*, CPSGMHB Case No. 04-3-0021, Final Decision and Order (June 13, 2005) (PFR challenged Comp Plan update, deficiency of capital facilities plan related to parks, and parks regulations); *Fallgatter II v. City of Sultan*, CPSGMHB Case No. 05-3-0008, consolidated with *Fallgatter III v. City of Sultan*, CPSGMHB Case No 05-3-0010c, Order of Dismissal (June 24, 2005) (PFR challenged Comp Plan amendments and Urban Center Zone regulations for deficiency of capital facilities plan and transportation plan)- settled; *Fallgatter IV v. City of Sultan*, CPSGMHB Case No. 05-3-0035, Order of Dismissal (Oct. 27, 2005) (PFR challenged water and sewer availability procedure) – repealed; *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0003, Final Decision and Order (June 29, 2006) (PFR challenged failure to update development regulations and critical areas ordinances, and deficiencies in six-year TIP, CFP, water and sewer plans, and parks plan) – compliance pending; *Fallgatter VI v. City of Sultan*, CPSGMHB Case No. 06-3-0017, Final Decision and Order (July 9, 2007) (PFR challenged lack of stormwater management plan) ; *Fallgatter VII v. City of Sultan*, CPSGMHB Case No. 06-3-0023, Order of Dismissal (June 29, 2006) (PFR challenged annexation) – dismissed on jurisdictional grounds; *Fallgatter VIII v. City of Sultan*, CPSGMHB Case No. 06-3-0034, Final Decision and Order (Feb. 13, 2007) (PFR challenged TIP) – compliance pending; *Fallgatter IX v. City of Sultan*, CPSGMHB Case No. 07-3-0017, Final Decision and Order (Sept 5, 2007) (alleging deficiencies in the updated CFP) – compliance pending. 06303, 06334, 07317 *Fallgatter V, Fallgatter VIII, Fallgatter IX (March 14,, 2008)*

However, the Board has made note that the City's chronic noncompliance also results from a lack of political will to abide by the State law. See *Fallgatter VIII*, FDO, at 11 ("The long-missed deadline for updating its Plan ... has been put on the back burner by the City in order to pursue short-term funding"). The Board concurs with Petitioners' assessment that "[t]he record before the Board shows that the City of Sultan has disregarded its planning obligations and is resentful of the imposition of planning requirements by the State's mandated Growth Management Act." *Fallgatter Response to SATC*, at 5.

At the coordinated compliance hearing on the three pending cases, the City of Sultan acknowledged continuing noncompliance. But the City reported that it has now sought assistance from the Department of Community Trade and Economic Development (CTED) and from Snohomish County planning staff, it has retained competent consultants, and it has hired an experienced interim Planning Director. SATC, at 4. At the hearing, the City stated that it has dedicated \$457,000 of its \$1.2 million 2008 general fund budget to finishing its GMA compliance work.

## **II. PROCEDURAL BACKGROUND**

On January 10, 2008, the Board received identical pleadings from Respondent City of Sultan in the three cases in which compliance proceedings are pending: CPSGMHB Case No. 06-3-0003 (*Fallgatter V-Comp Plan*), 06-3-0034 (*Fallgatter VIII-TIP*), and 07-3-0017 (*Fallgatter IX-Capital Facilities Plan*) – [collectively, **City SATC**]. The City requested a new compliance deadline for all three cases and asked that the Board consider the requests at a coordinated hearing on February 7, 2008.

On January 28, 2008, the Board received responsive pleadings from Petitioner Fallgatter in each of the cases, entitled "Response to City's Report on Compliance & Motion for Revised Compliance Schedule and Petitioners' Motion for Sanctions" [collectively, **Fallgatter Response to SATC**].

The Compliance Hearing in CPSGMHB Case Nos. 06-3-0003, 06-3-0034, and 07-3-0017 was convened on February 7, 2008, from 2 p.m. to 3:45 p.m. in the Chief Sealth Training Room, 20<sup>th</sup> Floor, 800 Fifth Avenue, Seattle. Present for the Board were Board members Margaret Pageler, Presiding,<sup>2</sup> Ed McGuire, and Dave Earling, and Board staff attorney Julie Ainsworth-Taylor. Petitioners Jocelyne Fallgatter and Jeff Kirkman were present, *pro se*. Respondent City of Sultan was represented by Andrew Lane of Cairncross & Hemplemann. Also in attendance were Mayor Carolyn Eslik, City Manager Deborah Knight, and Interim Planning Director Brad Collins. Commissioner Steven Fox, representing Fire District Five, a participant in the compliance proceedings on Case No. 06-3-0034, also attended the hearing.

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<sup>2</sup> Board member Dave Earling is the Presiding Officer for *Fallgatter IX*. For the sake of convenience, Board member Pageler presided over all three cases in this combined compliance proceeding.

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At the close of the hearing, the Board requested supplemental briefing from Respondent City of Sultan and a response from Petitioners. On February 13, 2008, the Board issued its Order for Supplemental Briefing. The following briefs were timely received:

- February 21, 2008 – City of Sultan’s Revised Proposed Compliance Schedule and Consideration of Development Moratorium [**City Revised Schedule**]. The City (1) submitted a plan to tighten the proposed compliance timeframe to six months and (2) indicated that the City would consider a development moratorium for six months in order to focus on completing its planning responsibilities and prevent vesting of projects to un-revised regulations.
- February 28, 2008 – City of Sultan’s Response to Arguments Re: Specific Development Regulations [**City Response - Invalidity**]. The City contends invalidity is not available as a remedy for failure-to-act.
- March 4, 2008 – Petitioners’ Rebuttal to City of Sultan’s Response to Arguments re: Specific Development Regulations [**Fallgatter Reply - Invalidity**].

On March 14, 2008, the Board received a copy of Ordinance No. 981-08, adopted March 13, 2008, imposing a six-month moratorium on development in the City of Sultan pursuant to RCW 36.70A.390. The moratorium prevents the acceptance and processing of applications for subdivisions, planned unit developments, rezones and annexations.

### **III. Fallgatter V – Comp Plan**

#### **Continuing Noncompliance.**

On June 29, 2006, the Board issued its Final Decision and Order in *Fallgatter V*. Of the multiple issues in the case, the City’s **continuing** failure to update development regulations is still before the Board. The FDO stated:

Regarding Legal Issue No. 7, the City of Sultan has **failed to act** to complete the revision and update of its comprehensive plan *implementing development regulations and critical areas ordinance* - and **has not fully complied** with the requirements of RCW 36.70A.130(1) and (4) regarding development regulations. Therefore, the City of Sultan is directed to take the necessary legislative action to comply with the revision and update requirements of RCW 36.70A.130(1)....

RCW 36.70A.300(3)(b) allows the Board to extend the 180-day compliance schedule for a noncompliant jurisdiction if the Board determines that the case is one of unusual scope or complexity. **The Board finds that the City of Sultan’s current circumstances make its task unusually complex**; therefore, the City of Sultan shall adhere to the following “extended” compliance schedule [allowing until April 30, 2007

to take compliant action to review and revise its implementing development regulations and critical areas ordinances].

*Fallgatter V*, FDO, at 23-24, emphasis in original.

At the first compliance hearing convened on June 4, 2007, the City demonstrated compliance with the review and revision of its critical areas regulations, and several other matters at issue. However, the review and update of development regulations was not yet accomplished. The Board's June 29, 2007, Order stated:

The Board set an exceptionally-long compliance schedule in this case in recognition of Sultan's circumstances in reorganizing its municipal planning functions. The City of Sultan is far behind in achieving compliance with routine GMA planning requirements....

The City of Sultan acknowledges that its review and update of the development regulations is not yet complete. Compliance Report, at 2. The review currently being conducted by the City is the ten-year review required by RCW 36.70A.130(1) and (4), with a statutory deadline of December 1, 2004. The City provides a schedule of procedures for completion of development regulation revisions with an anticipated deadline of October 20, 2007.

.... [The Board therefore Ordered:] ...

- 5 The Board finds and concludes that the City of Sultan has **failed to act** to complete the revision and update of its comprehensive plan implementing development regulations as required by RCW 36.70A.130(1) and (4). Therefore the Board enters an **order of continuing noncompliance**.
- 6 *In light of the City of Sultan's long delay in achieving compliance with routine GMA planning requirements, the Board notifies the Governor of this matter.* The Board will make a determination of invalidity and request sanctions if compliance is not achieved as set forth in the extended schedule set forth below [establishing December 31, 2007 as the compliance deadline and setting a Compliance Hearing for February 7, 2007].

*Fallgatter V*, Order Finding Partial Compliance [Re: Water Plan, Sewer Plan, and Critical Areas Regulations], Finding Continuing Noncompliance [Re: TIP and Failure to Act] and Amending Compliance Schedule, at 3-6, emphasis in original.

In its January 10, 2008, SATC and at the February 7, 2008, Compliance Hearing, the City acknowledged that it had **still not reviewed its development regulations** as required by

RCW 36.70A.130(1) and (4) and the Board's Orders. The Board will therefore enter an **order finding continuing noncompliance**.

*Amended Compliance Schedule.*

In its SATC, the City requested an additional one-year extension, submitting a one-year work plan and providing information about the various consultants retained by the City to assist in this effort. The SATC stated:

The Board is familiar with the City's struggles with its GMA planning activities. The City has been in a cycle of action and reaction, focusing on addressing specific compliance and remand issues, at the expense of Comprehensive Plan consistency. This was due in part to the limited financial and technical resources available to the City.

SATC, at 1-2.

During the February 7, 2008 coordinated compliance hearing, the Board noted that the GMA allows some abbreviation of public involvement processes when a jurisdiction is responding to a Board's compliance order. The Board also noted that GMA planning requirements appear to have taken a back seat to the work of processing development applications in Sultan, due in part to insufficient staff. The Board commented that the GMA, at RCW 36.70A.390, provides a course of action for jurisdictions that need additional time to resolve difficult Plan or development regulation issues, namely the imposition of interim regulations or a moratorium. The Board further commented that if the City enacted one or more moratoria on development both the City staff and the Planning Commission could focus on the GMA mandated tasks of updating the Plan and adopting consistent implementing development regulations.

The City subsequently adopted and provided the Board with an expedited compliance schedule, with a target date of September, 2008, for the City's adoption of updated development regulations and resolution of the matters involved in *Fallgatter VIII and IX*. City Revised Schedule, at 2. Two weeks later, the City adopted a development moratorium – Ordinance No. 981-08.

The Board notes that this is at least the fourth City of Sultan work plan in the last three and a half years with many of the same or overlapping work items. *Fallgatter III*, CPSGMHB Case No. 05-3-0010c, which was mediated and settled (Order of Dismissal, June 24, 2005), culminated in a City commitment to work through the incomplete comprehensive plan components in the next year. That process was soon abandoned, and the Planning Commission, of which Petitioners were both members, was abolished.

A subsequent work plan, dated March 2006, is attached as Appendix B to the Final Decision and Order in *Fallgatter V*, where the Board stated:

The Board recognizes that the Work Plan is not a binding document. The Board cites to this Work Plan *as an indication of the City's good faith efforts* to bring its planning activities into statutory alignment.

*Fallgatter V*, FDO, at 17, fn. 16, emphasis in original.

The Board relied substantially on this work plan in setting an extended compliance schedule (to April, 2007) in the *Fallgatter V* FDO. *Id.*, at 20-23.

At the Compliance Hearing in June, 2007, the City acknowledged that it was still noncompliant and requested another extension to the end of 2007. At the February 7, 2008, Compliance Hearing, the City requested an additional year extension to December, 2008. At the Board's request, that proposed schedule has now been expedited to September, 2008.

Petitioners have understandably lost patience:

The City attributes the dysfunction of planning activities "in part to the limited financial and technical resources available to the City." Sultan has never provided evidence or explanation as to why its resources are any more limited than other comparable small cities in the Puget Sound Region that somehow manage to meet the requirements of the GMA. The record before the Board shows that the City of Sultan has disregarded its planning obligations and is disparaging and resentful of the imposition of planning requirements by the State's mandated Growth Management Act.

Fallgatter Response to SATC, at 5.<sup>3</sup>

Petitioners state:

Not much has changed since the very first PFR filed by Petitioners where the City Planner was quoted to the effect that the city just gets "a plan on the books" to jump through the "hoops of the state" in order to get grants.

Fallgatter Reply – Invalidity, at 6, citing *Fallgatter I*, Final Decision and Order (June 13, 2005), at 13.<sup>4</sup>

The Board can appreciate Petitioners' skepticism about the City's proposed schedule. Nevertheless, **the Board will accept the expedited compliance schedule adopted by the Sultan City Council**. The Board notes that the City has allocated a large portion of

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<sup>3</sup> Petitioners at the coordinated compliance hearing also contended that the City's un-reviewed development regulations and planning inconsistencies have led to a developer lawsuit and to loss of potential impact fees.

<sup>4</sup> The Board notes that one thing that has changed is that the City Planner referred to has now been replaced.

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its general fund budget to this task in 2008, has sought assistance from CTED, has retained competent consultants, and has hired an experienced interim Planning Director. SATC, at 4. The City will need to rely on CTED's assistance to help ensure that the consultants are not permitted to make the task more complicated than it needs to be. The City will also need to ensure that Planning Commission and staff resources are focused on completing the Plan Update and revision of development regulations.

Invalidity.

RCW 36.70A.302(1) provides for a determination of invalidity as follows:

(1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;

(b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

(c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

At the February 7, 2008 coordinated compliance hearing and in supplemental briefing, the City argued that the Board could not invalidate the City's development regulations, notwithstanding the City's failure to act by the December 1, 2004, statutory deadline for review and revision. City Response – Invalidity, at 2-3. The City's position is that the statutory remedy of invalidity is narrowly tailored and must be narrowly applied, with the Board identifying specific portions of the City's plan or regulations that substantially interfere with specific goals of the Act. The City asserts that the remedy simply cannot be applied to a broad failure-to-act challenge. *Id.* Alternatively, the City contends that Petitioners have not carried their burden as to invalidity. *Id.* at 3. The City further argues that a determination of invalidity of development regulations is not necessary because development projects will be halted due to the invalidity of the City's TIP and Capital Facilities Plan under *Fallgatter VIII and IX. Id.* at 4-5.

Petitioners reply that their petition and briefing in *Fallgatter V* identified specific flaws in a number of the City's un-reviewed development regulations. *Fallgatter Reply – Invalidity*, at 3. Petitioners argue that the City conceded its failure-to-act and did not rebut their examples; therefore, they assert they have carried their burden. *Id.* Further, Petitioners point out that Hearing Examiner rulings and City Council actions continue to



allow development projects to vest and go forward, notwithstanding the invalidity of the City's TIP and Capital Facilities Plan. *Id.* Exhibits 1, 2, 3.

The Board notes that it has recently reaffirmed early decisions invalidating development regulations based on invalid capital facilities plans. *Suquamish II v. Kitsap County*, CPSGMHB Case No. 07-3-0019c, Order on Motion for Reconsideration (Sept. 13, 2007), at 3-4;<sup>5</sup> following *Bremerton v. Kitsap County (Bremerton)*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order, (Oct. 6, 1995), at 77; *West Seattle Defense Fund v. City of Seattle (WSDF)*, CPSGMHB Case No. 94-3-0016, Final Decision and Order, (Apr. 4, 1995), at 45.

The Board is not persuaded that RCW 36.70A.302(1) precludes invalidation in this case. Without question, Sultan's failure to review its development regulations thwarts the goals of the GMA. The Board considers that invalidation of un-reviewed development regulations would address several significant roadblocks in Sultan's path toward compliance: the diversion of scarce City resources of staff, planning commission, and city council time and attention from the compliance task, as the Board noted in a prior compliance hearing, and the continued vesting of projects based on outdated and inadequate standards, thus virtually guaranteeing inconsistency with substantive requirements of the GMA. See *Fallgatter VIII*, FDO, at 11, fn. 7. However, both of these roadblocks have now been addressed by the City's enactment of Ordinance No. 981-08, the development moratorium. The Board therefore **does not enter a determination of invalidity** at this time.

#### Sanctions.

The Board concludes that the GMA remedy for failure-to-act is sanctions. RCW 36.70A.345 specifically empowers the Governor to impose sanctions on a jurisdiction that fails to complete required GMA actions by the statutory deadlines. The Governor must find *either* that the jurisdiction is not proceeding in good faith *or* that it has "unreasonably delayed taking the required action." RCW 36.70A.345 provides:

The governor may impose a sanction or sanctions specified under RCW 36.70A.340 on: (1) A county or city that fails to designate critical areas, agricultural lands, forest lands, or mineral resource lands under RCW 36.70A.170 by the date such action was required to have been taken; (2) a county or city that fails to adopt development regulations under RCW 36.70A.060 protecting critical areas or conserving agricultural lands, forest lands, or mineral resource lands by the date such action was required to have been taken; (3) a county that fails to designate urban growth areas under RCW 36.70A.110 by the date such action was required to have been taken;

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<sup>5</sup>*Suquamish II* involved a timely challenge to specific plans or regulations enacted in parallel with the deficient capital facilities plan, not invalidation based on a failure to meet statutory deadlines for review and revisions.

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and (4) a county or city that fails to adopt its comprehensive plan or development regulations when such actions are required to be taken.

Imposition of a sanction or sanctions under this section shall be preceded by written findings by the governor, that either the county or city is not proceeding in good faith to meet the requirements of the act; or that the county or city has unreasonably delayed taking the required action....

RCW 36.70A.330(3) authorizes the Board to recommend that the Governor impose sanctions “[i]f the board after a compliance hearing finds that the [city] is not in compliance.” More than three years beyond the statutory deadline and after two compliance hearings, the City of Sultan is still not in compliance on this matter. In determining whether to recommend that the Governor impose sanctions, the Board is required to “take into consideration the [city’s] efforts to meet its compliance schedule.” *Id.*

The Board finds that the City has not in the past demonstrated efforts to review and revise its development regulations – due under the statute by December 1, 2004.<sup>6</sup> However, the City has now replaced its Planning Director, allocated much of its 2008 general fund budget to GMA compliance, retained competent consultants, and enacted a development moratorium to allow Planning Commission and City Council to focus on the long-delayed GMA requirements. SATC, at 4, and Ordinance 981-08. The Board therefore **will not at this time recommend that the Governor impose sanctions.**

#### **Conclusion Re: *Fallgatter V***

Because of the City’s ongoing failure to act to review and revise its development regulations by the statutory deadline, the Board enters an **order finding continuing noncompliance**. The Board sets a **new compliance schedule** based on the expedited compliance schedule adopted by the City of Sultan. The Board declines to issue a determination of invalidity at this time or to request the Governor to impose sanctions.

#### **IV. *Fallgatter VIII - TIP and Fallgatter IX - Capital Facilities Plan***

##### ***TIP Inconsistent with Comprehensive Plan [Fallgatter V and VIII]***

This issue too has a lengthy history. The FDO for *Fallgatter V*, issued June 29, 2006, found Sultan’s 2005-2011 TIP noncompliant. At a compliance hearing a full year later, the City acknowledged continuing noncompliance and requested an extended compliance schedule.

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<sup>6</sup> The City’s efforts to bring its TIP, Transportation Element and Capital Facilities Plan into compliance are acknowledged, *infra*.

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The City's Compliance Report states that the City's TIP work is not yet complete. The City refers to its more detailed report for *Fallgatter VIII v. City of Sultan*, CPSGMHB Case No. 07-3-0034, which challenged the 2006-2012 TIP. The City indicates a scheduled completion date of August 1, 2007, when a 2007-2013 TIP will be adopted. The City acknowledges continuing noncompliance and requests an extended compliance schedule. Compliance Report, at 3-4.

*Fallgatter V*, Order Finding Partial Compliance [Re: Water Plan, Sewer Plan, and Critical Areas Regulations], Finding Continuing Noncompliance [Re: TIP and Failure to Act] and Amending Compliance Schedule (June 29, 2007).

While *Fallgatter V* challenged the City's enactment of its 2005 TIP, *Fallgatter VIII* challenged the 2006 TIP, which the Board found noncompliant and invalid. In the *Fallgatter VIII* Final Decision and Order, issued February 13, 2007, the Board explained the determination of invalidity:

Sultan's adoption of the 2006 TIP, a TIP which is inconsistent with its Plan and based on a non-compliant Transportation Element and CFP, interferes with the fulfillment of the goals of the GMA, in particular RCW 36.70A.020(1), (3), and (12), because the enactment thwarts the GMA mandate to accommodate urban growth where urban services can be provided, to encourage an efficient and coordinated transportation system, and to ensure provision of urban services in urban areas as growth occurs, without decreasing service levels for existing residents....

The Board is cognizant that the City of Sultan has retained a consultant to assist it in developing a Transportation Element for its Plan. However, the statutory deadline for this work has long passed, and a TIP based on the non-compliant Plan element is clearly erroneous. Particularly in light of the City's rapid growth, the Board finds that the lack of a compliant TIP thwarts the goals of the GMA and **substantially interferes** with the achievement of Goal 1, Goal 3, and Goal 12. ...

The Board finds and concludes that the City's ongoing permitting of subdivisions in the absence of a compliant Transportation Element and TIP thwarts the goals of the GMA.

*Fallgatter VIII*, FDO, at 14-15.

The *Fallgatter VIII* FDO set the compliance deadline for May 15, 2007. At the first compliance hearing, the City acknowledged continuing noncompliance and represented that its work would be completed by August. The Board set the extended compliance

deadline in *Fallgatter VIII* for August 15, 2007.<sup>7</sup> At the second compliance hearing, the City acknowledged continuing noncompliance and the Board set a new compliance schedule with a December 31, 2007 deadline.<sup>8</sup>

At the third compliance hearing – the coordinated hearing on February 7, 2008 - the City acknowledged that its TIP and Transportation Element are still not adopted and consistent with its comprehensive plan as required by RCW 36.70A.210. SATC, at 3. However, the City represented that the work on the Transportation Element has been completed but has not yet been enacted because review of the TIP revealed the necessity for revision of other provisions of the Comprehensive Plan (employment assumptions, funding sources, and the like) in order to ensure consistency. *Id.* As it has done for the past few years, the City essentially asks for more time to bring all the elements of its plan forward in a consistent package.

In response, at the coordinated compliance hearing Petitioners did not dispute the City's claim that it has essentially *done the work* required for a current and complete TIP and Transportation Element, but pointed out that nonetheless, the City has not acted to adopt the necessary provisions.

*Noncompliant Capital Facilities Plan [Fallgatter IX]*

The deficiencies in Sultan's capital facilities planning have also been raised in appeals brought by Petitioners since September, 2004. See *Fallgatter I*, CPSGMHB Case No. 04-3-0021, Final Decision and Order (June 13, 2005), at 5-6.

On September 5, 2007, the Board issued its Final Decision and Order in *Fallgatter IX*, CPSGMHB Case No. 07-3-0017. At issue was Sultan's December 2006 Capital Facilities Plan (CFP). The FDO concluded that the CFP:

- does not comply with the requirements of RCW 36.70A.070(3) and .020(12), since it does not demonstrate that adequate public facilities and services [i.e. sanitary sewer, domestic water, parks and recreation] will be available within the planning period for the population within the urban growth area;
- does not comply with the requirements of RCW 36.70A.070(3) and .020(12), because it fails to incorporate adopted locally-established minimum service standards or "Levels of Services" within the Capital Facilities Plan;
- does not comply with the requirements of RCW 36.70A.070(3) and .020(12), because based on identified funding shortfalls, the

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<sup>7</sup> *Fallgatter VIII*, Order Finding Continuing Noncompliance and Invalidity and Amending Compliance Schedule (June 18, 2007).

<sup>8</sup> *Fallgatter VIII*, Order Finding Continuing Noncompliance and Invalidity [Re: TIP] and Setting Third Compliance Schedule (October 3, 2007).

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City failed to implement reassessment strategies set forth in its Capital Facilities Plan to address such shortfalls;

- [and therefore] the Board has found that the continued validity of the Capital Facilities Plan substantially interferes with the fulfillment of Goal 12 – RCW 36.70A.020(12). Consequently, the Board has entered a determination of invalidity with respect to Ordinance 942-06.

*Fallgatter IX*, FDO, at 18. The FDO set a compliance deadline of January 13, 2008.

In its SATC and at the February 7, 2008, coordinated compliance hearing, the City readily acknowledged that it had not yet enacted a compliant CFP. As with the TIP and Transportation Element, the City indicated that the work it has done on revising its CFP has revealed inconsistencies with the assumptions of other parts of the City's comprehensive plan and requires a thorough, coordinated effort. SATC at 3.

Petitioners agree that planning must be coordinated and comprehensive. At the hearing, they contended, however, that the City continues to make arbitrary and *ad hoc* decisions, not guided by an overall policy, and that the City continues to vest and approve development applications, despite invalidity of the TIP and CFP. See, *Fallgatter Reply – Invalidity*, Ex. 1, 2, 3 re: Twin Rivers Ranch Estates.

#### Board Discussion

The Board has found the City's TIP noncompliant because it is based on a noncompliant Transportation Element that does not meet the standards of RCW 36.70A.070(6) and has found the Capital Facilities Element noncompliant with the standards of RCW 36.70A.060(3). The Board invalidated both actions as impermissibly interfering with various GMA Goals. RCW 36.70A.070(1), (3), (7), and (12). The City acknowledges continuing noncompliance and invalidity. Consequently, the Board will enter an **order finding continuing noncompliance and invalidity**.

The Board will provide a new compliance schedule allowing the City until September, 2008 to complete its compliance work. The Board recognizes that some part of the required work has already been done, but that reviewing and revising related portions of the comprehensive plan to ensure consistency, and updating the development regulations so that all of the City's GMA enactments are coordinated, will require intensive effort. In reliance on the City's commitment to a broader review, the Board accepts the City's schedule and incorporates it in this order.

Petitioner has also moved that the Board request the Governor to impose sanctions. The Board denies the motion for sanctions with respect to *Fallgatter VIII and IX*. As to *Fallgatter VIII*, the Board accepts the City's representation that it has completed the work on revising its TIP and Transportation Element but has not enacted the revisions because its review disclosed inconsistencies in assumptions and provisions of other parts of the

comprehensive plan and development regulations, which must now be brought into alignment. As to *Fallgatter IX*, this is the first compliance hearing for the CFP (and less than 180-days after the FDO), and the Board accepts the City's representation that its work on this matter is well underway. The Board will not request the Governor to impose sanctions at this time. Petitioners' motion is **denied**.

### **Conclusion Re: *Fallgatter VIII and IX***

The Board enters an **Order Finding Continuing Noncompliance and Invalidity** in *Fallgatter VIII* and *Fallgatter IX* because of the City's failure to take legislative action to bring its TIP and CFP into compliance as set forth in the respective FDOs. The Board sets a **new compliance schedule** based on the expedited compliance schedule adopted by the City of Sultan. Petitioners' motion for sanctions is **denied**.

### **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Pursuant to RCW 36.70A.130(1) and (4), the City of Sultan was required to review and revise its development regulations by December 1, 2004. More than three full years later – March, 2008 – the City acknowledges that it has as yet failed to act to complete the required review and revision of its development regulations.
2. The Final Decision and Order in *Fallgatter V*, CPSGMHB Case No. 06-3-0003, found the City of Sultan noncompliant for failure to act to complete the required review.
3. At Compliance Hearings on this matter held June 4, 2007, and February 7, 2008, the City of Sultan acknowledged that it has not fully complied with the FDO in that it has still failed to act to review and revise its development regulations.
4. For three years, the City of Sultan has allowed projects to vest and has continued to approve applications for development based on development regulations that were not reviewed and revised in 2004 as required by statute. See, e.g., *Fallgatter Reply – Invalidity*, at 3, Exhibits 1, 2, 3; *Fallgatter VIII*, FDO, at 11, fn. 7.
5. For three years, the City of Sultan has continued to divert its scarce land use and planning resources to processing current project applications rather than completing the review and revision of development regulations mandated by the statute. See *Fallgatter V*, FDO at 7; *Fallgatter VIII*, FDO, at 5, fn. 4.
6. On March 13, 2008, the City of Sultan adopted Ordinance No. 981-08, imposing a moratorium on development pursuant to RCW 36.70A.390.
7. The City of Sultan has dedicated significant 2008 budget resources to completing its GMA requirements, has replaced prior staff with a trained professional, has entered into contracts with consultants for various components of the work, is consulting with CTED and with Snohomish County planning staff, and has adopted a comprehensive work plan that includes public participation and aims to result in enactment of a consistent set of GMA provisions in September, 2008.
8. The statutory remedy for failure to act by the statutory deadlines is a request to the governor to impose sanctions. RCW 36.70A.345. The statutory remedy for

- failure to comply with an order of the Board, after a compliance hearing [and there have been two in *Fallgatter V*], is a request to the Governor to impose sanctions. RCW 36.70A.330(3).
9. The Board does not make a determination of invalidity with respect to *Fallgatter V – Comp Plan* or request sanctions at this time because the City has dedicated significant resources to GMA compliance in 2008 and has imposed a development moratorium to support focused efforts toward GMA compliance.
  10. Pursuant to RCW 36.70A.070(3) and (6), the City of Sultan is required to enact a TIP, Transportation Element and Capital Facilities Plan that contain certain mandatory elements and are consistent with its Comprehensive Plan.
  11. In *Fallgatter VIII and IX*, the Board found the City of Sultan's TIP, Transportation Element and Capital Facilities Plan noncompliant and entered determinations of invalidity.
  12. At the third compliance hearing for *Fallgatter VIII - TIP*, held February 7, 2008, the City represented that its Transportation Element and TIP are complete but cannot be enacted until other components of the comprehensive plan are changed to ensure consistency. The Board finds that the City is acting in good faith in requesting additional time to bring its TIP and Transportation Element into compliance.
  13. The February 7, 2008, hearing was the first compliance hearing for *Fallgatter IX – Capital Facilities Plan*. The City acknowledges that its revised CFP has not yet been completed and enacted.
  14. The Board does not request sanctions at this time with respect to *Fallgatter VIII – TIP* because of the City's representation that the transportation component of its planning has been completed.
  15. The Board does not request sanctions at this first compliance hearing with respect to *Fallgatter IX – CFP*, because this matter is already subject to invalidity and because work appears to be in process.

## **VI. ORDER**

Based upon review of the Final Decisions and Orders and prior Board orders in the coordinated cases,<sup>9</sup> the Statements of Actions Taken to Comply, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

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<sup>9</sup> *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0003, Final Decision and Order (June 29, 2006) *Fallgatter V*, Order Finding Partial Compliance [Re: Water Plan, Sewer Plan, and Critical Areas Regulations], Finding Continuing Noncompliance [Re: TIP and Failure to Act] and Amending Compliance Schedule (June 29, 2007).

*Fallgatter VIII v. City of Sultan*, CPSGMHB Case No. 06-3-0034, Final Decision and Order (Feb. 13, 2007)

*Fallgatter VIII*, Order Finding Continuing Noncompliance and Invalidity and Amending Compliance Schedule (June 18, 2007)

*Fallgatter VIII*, Order Finding Continuing Noncompliance and Invalidity [Re: TIP] and Setting Third Compliance Schedule (October 3, 2007)

*Fallgatter IX v. City of Sultan*, CPSGMHB Case No. 07-3-0017, Final Decision and Order (Sept 5, 2007) 06303, 06334, 07317 *Fallgatter V, Fallgatter VIII, Fallgatter IX (March 14,, 2008)*

**Order of Continuing Noncompliance, Amending Compliance Schedule**

1. In *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0003, the Board enters an **order finding continuing noncompliance** with RCW 36.70A.130(1) and (4) because of the City's ongoing failure to act to review and revise its development regulations by the statutory deadline, December 1, 2004. The Board sets a **new compliance schedule** below. The Board declines to enter a determination of invalidity at this time.
2. In *Fallgatter VIII v. City of Sultan*, CPSGMHB Case No. 06-3-0034, the Board enters an **order finding continuing noncompliance** with RCW 36.70A.070(6) and **continuing invalidity** due to substantial interference with GMA Goals RCW 36.70A.020(1), (3), and (12). The Board sets a **new compliance schedule** below.
3. In *Fallgatter IX v. City of Sultan*, CPSGMHB Case No. 07-3-0017, the Board enters an **order finding continuing noncompliance** with RCW 36.70A.070(3) and **continuing invalidity** due to substantial interference with GMA Goal RCW 36.70A.020(12). The Board sets a **new compliance schedule** below.
4. Petitioners' motion that the Board request the Governor to impose sanctions with respect to *Fallgatter V*, *Fallgatter VIII*, and *Fallgatter IX* is denied.
5. The coordinated compliance schedule for *Fallgatter V*, *Fallgatter VIII*, and *Fallgatter IX* is set forth below:
  - The Board establishes **September 30, 2008**, as the deadline for the City of Sultan to take appropriate legislative action to comply with the GMA as interpreted in this Order.
  - By no later than **October 10, 2008**, the City of Sultan shall file with the Board an original and four copies of the legislative enactments taken to comply with this Order, along with a statement of how the enactments comply with this Order (**Statement of Actions Taken to Comply - SATC**). By this same date, the City shall also file a "**Compliance Index**," listing the procedures (meetings, hearings, etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
  - By no later than **October 24, 2008**,<sup>10</sup> the Petitioners may file with the Board an original and four copies of Response to the City's SATC.
  - By no later than **October 31, 2008**, the City may file with the Board a Reply to Petitioner's Response.

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<sup>10</sup> October 24, 2008, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in the FDO.

06303, 06334, 07317 *Fallgatter V, Fallgatter VIII, Fallgatter IX* (March 14, 2008)

**Order of Continuing Noncompliance, Amending Compliance Schedule**

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- Each of the pleadings listed above shall be simultaneously served on the other party to this proceeding.
- Pursuant to RCW 36.70A.330(1), the Board hereby gives notice of, and schedules, the Compliance Hearing in this matter for **November 6, 2008, at 10:00 a.m.** at the Board's offices. **The compliance hearing shall be limited to consideration of the Legal Issues found to be in continuing noncompliance and invalidity in this Order.** If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Sultan takes the required legislative action prior to the **September 30, 2008**, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 14th day of March, 2008.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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David O. Earling  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member